

12-1993

# Not Guilty by Reason of Victimization

Susan Rutberg

*Golden Gate University School of Law, [srutberg@ggu.edu](mailto:srutberg@ggu.edu)*

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/pubs>



Part of the [Criminal Law Commons](#)

---

## Recommended Citation

20 CACJ Forum 36 (Dec. 1993)

This Article is brought to you for free and open access by the Faculty Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in Publications by an authorized administrator of GGU Law Digital Commons. For more information, please contact [jfischer@ggu.edu](mailto:jfischer@ggu.edu).

# Not Guilty by Reason of Victimization

by Susan Rutberg

*If you put a dog in a cage, and keep poking him with a stick, sooner or later he's going to bite you.*

—George Jackson, author of *Soledad Brothers: The Prison Letters of George Jackson*

On October 26, 1991, 17-year-old Felicia Morgan and two teenage friends went on what the press termed a "crimes of fashion" spree in downtown Milwaukee. With guns in hand they walked up to people on the street and took clothes, jewelry, and shoes. When 17-year-old Brenda Adams tried to run away rather than give up the new patchwork leather coat she'd gotten for her birthday, Felicia Morgan shot her dead.

Felicia's lawyer, Milwaukee criminal defense attorney Robin Shellow, put on expert testimony to support a Post Traumatic Stress Disorder (PTSD) defense. Shellow tried to convince the jury that Felicia suffered from an urban combat-induced traumatic stress reaction, resulting from her life-long exposure to intrafamily and community violence.

Post Traumatic Stress Disorder (PTSD)<sup>1</sup> is a phenomenon named by psychiatrists to describe the physical and emotional behavior patterns of trauma

survivors: survivors of the kind of trauma that is considered outside the range of ordinary human experience. When use of the term first became popular in the late 1970s, it was most commonly associated with Vietnam veterans and their combat-induced behavioral disorders.<sup>2</sup> The APA and the psychiatric community have now recognized that PTSD also describes the behavior of people who have survived a variety of other traumatic experiences, and that there are links between traumatic victimization and subsequent anti-social behavior.<sup>3</sup>

Events that may result in PTSD in children include: exposure to violence and/or sexual abuse (intra-family and/or in the child's immediate community), exposure to war, and the occurrence of natural disasters (fires, floods, Three Mile Island, etc.).<sup>4</sup> Sometimes PTSD is triggered by one horrific event; sometimes by chronic abuse. Not every exposure to a traumatic event results in PTSD, and not every person diagnosed as suffering from PTSD exhibits all the same symptoms.

Dr. James Garbarino, a Chicago specialist on the effects of violence on children and one of the expert witnesses in

Felicia Morgan's case, describes constant exposure to a culture of violence as akin to growing up in chronic combat.<sup>5</sup> Whatever the type of trauma, PTSD symptoms may include increased aggression, abnormally quick responses of rage, and episodes in which the sufferer acts without control while reliving a traumatic experience.<sup>6</sup>

Felicia Morgan was beaten and threatened at gun and knife point by her mother throughout her childhood. The landlord raped her when she was 11. Later she was molested by her mother's boyfriend. Felicia often witnessed gunfights among family members, including seeing her mother shoot at both her father and the boyfriend. Two of her uncles were murdered two days apart. Felicia was present at the violent deaths of several other relatives and friends. When a psychologist asked Felicia how she had managed to stay alive, she said: "My ears be open, even when I'm asleep."<sup>7</sup> Shellow described her client's mental condition as a borderline personality disorder resulting from the cumulative effects of the violence in her life. According to Shellow, her client wasn't crazy "because she lived in a bad neighborhood, because she was poor, or because she was black . . . , she became crazy in order to survive."<sup>8</sup>

The jury found Felicia Morgan guilty

<sup>1</sup> PTSD has been formally recognized by the American Psychiatric Association and listed in its Diagnostic and Statistical Manual of Mental Disorders (DSM) since 1980. The DSM (the Bible of psychiatric diagnoses) is currently being revised for a fourth edition, DSM-IV. As part of the process of revising it, a sub-workgroup of APA members has recently published a book, *Post Traumatic Stress Disorder: DSM-IV And Beyond*, American Psychiatric Press, Inc.; (Davidson and Foa, ed., 1993). While this publication does not present the official position of the DSM-IV Task Force, which is responsible for revising the DSM, it gives a good indication of the more inclusive definition of PTSD that will be included in DSM-IV.

<sup>2</sup> See *People v. Lucero* (1988) 44 Cal.3d 1006 (reversible error to exclude penalty phase defense expert testimony re possibility that Lucero suffered from PTSD as result of service in Vietnam war), and *People v. Bruhn* (1989) 210 Cal.App.3d 1195 (Lucero had served combat duty in Vietnam. Court ordered case remanded for resentencing directing trial court to consider federal commitment for Lucero—per PC 1170.9—and exercise discretion.)

<sup>3</sup> PTSD: DSM-IV AND BEYOND, *supra*; HERMAN, J., *TRAUMA AND RECOVERY*, Basic Books (1992); Kaser-Boyd, N., *Post-Traumatic Stress Disorders in Children and Adults: The Legal Relevance* (WESTERN STATES LAW REVIEW, publication forthcoming).

<sup>4</sup> PTSD: DSM-IV AND BEYOND, *supra* at xi.

<sup>5</sup> Dr. Garbarino contends that tens of thousands of inner-city children probably suffer not only from PTSD, but also from a loss of faith in adults and in the future. Woo, J., *Urban Trauma Mitigates Guilt, Defenders Say*, The Wall Street Journal, 4/27/93.

<sup>6</sup> THE AMERICAN PSYCHIATRIC ASSOCIATION DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 3rd Ed., Revised (DSM-III-R) 1987.

<sup>7</sup> Woo, *supra*, The Wall Street Journal, 4/27/93.

<sup>8</sup> Flaherty, *The Ghetto Made Me Do It*, IN THESE TIMES at 19 (April 5, 1993).

of first degree murder. In the second phase of the trial, the same jury rejected her insanity defense—but in the end, the judge, who had heard months of testimony about the horrors that made up Felicia's life, sentenced her to the absolute minimum amount of prison time. She will be parole eligible in 13 years.<sup>9</sup>

### Overrepresentation of PTSD Sufferers Among Criminal Defendants

PTSD is now understood to be "a problem of substantial magnitude in the general population." According to a 1991 study, 4 out of 10 Americans have experienced major trauma, and the disorder itself may be present in 9% of the population.<sup>10</sup>

Criminal defense lawyers have long known intuitively that PTSD survivors like Felicia Morgan are enormously overrepresented among our clients. For many of our clients, born and raised amid incredible violence, this prolonged exposure (as victim and witness) may result in the form of PTSD that Felicia Morgan's lawyer described as "Urban Psychosis."<sup>11</sup>

The publicity surrounding California's most recent executions has brought similar horrifying life stories of death row inmates to the front page of our collective consciousness, and has helped make the link between early victimization and later perpetration painfully clear. The two men executed by the State within the last two years, Robert Alton Harris (the product of both Fetal Alcohol Syndrome<sup>12</sup> and a violent child-

hood), and David Mason (beaten and humiliated as a child, violent and suicidal as an adult), are both examples of people who grew up to do unto others some version of what was done to them as children.

Recent studies of death row prisoners indicate that, in addition to (or as a result of) shared histories of child abuse, many of the prisoners also suffer from brain damage. The root cause of the neurological damage may be Fetal Alcohol Syndrome, or severe head injury, or both, but the results are similar: scars in the parts of the brain that affect judgment and the ability to control rage and other emotions. Although certainly not every victim becomes a perpetrator, a brain-damaged child raised in an atmosphere of chronic violence is a likely candidate for socially unacceptable behavior.<sup>13</sup>

As criminal defense lawyers we are privy to our clients' psycho-social histories in a way that others in the system are not. We have a responsibility to educate judges and juries about the relevance of traumatic events to the formation of specific intent, and to the significance of PTSD as a factor in mitigation at sentencing.<sup>14</sup> We do much more for our clients if we can bring this information to light early on, as part of our representation of first-time offenders. While the PTSD defense has been employed almost exclusively in homicide cases, we must not hold this



*Susan Rutberg, formerly a deputy public defender in San Francisco, is now an Associate Professor at Golden Gate University School of Law. She is a board member of Women Defenders.*

defense in reserve until a client's mental state has degenerated to the point where they face the most serious crime. This article is written to help defense lawyers focus on this most critical defense early enough in our clients' lives to offer them real help.

cused of killing their parents. Defense lawyer Leslie Abramson tried to introduce evidence of the brothers' molestation and abuse to support their claim of self-defense. Initially, Superior Court Judge Stanley Weisberg refused to let the jury hear it, saying: "I think this whole issue is being blown out of proportion... that somehow there's a linkage between the molestation, if there was one, and the killings. It doesn't prove anything." Abramson's response is indicative of the gap in the perspectives, the parallel universes inhabited by bench and bar on this issue: "It does not surprise me to hear the court say that. It horrifies me, but it doesn't surprise me. . . . We can't get him (Judge Weisberg) to broaden his view of what the evidence is in this case, and I can't understand it." (*Parents' Shooting, Family Secrets: Court Weighs Whether Sex Abuse Bears on Sons' Guilt*, San Francisco Examiner 8/22/93 B-6, col.1.)

Eventually the defense succeeded in persuading the judge to admit evidence of the defendants' childhood abuse.

symptoms and subtle physical characteristics sometimes difficult to detect, including difficulty in telling right from wrong and understanding the consequences of behavior, and poor judgment.

According to the National Council on Alcoholism, an estimated 5,000 children—one in every 750—are born each year with FAS.

<sup>13</sup> A study of 15 death row inmates, conducted by Dorothy Otnow Lewis, a professor of Psychiatry at New York University School of Medicine, revealed that all 15 had evidence of severe head injury and 12 showed evidence of neurological problems, ranging from blackouts to amnesia, as well. (Lori Olszewski, *New Theory About What Makes a Murderer: Child Abuse Plus Brain Injuries*, San Francisco Chronicle, 8/12/93 A-1, A-12.)

<sup>14</sup> In the case of Lyle and Erik Menendez, on trial in Los Angeles at the time this article is being written, the two brothers are ac-

<sup>9</sup> Telephone conversation with Robin Shellow.

<sup>10</sup> PTSD: DSM-IV AND BEYOND, *supra* at xi, 1x, citing Breslau et al. 1991).

<sup>11</sup> Dr. Judith Herman has referred to this more complex form of PTSD as Disorder of Extreme Stress Not Otherwise Specified (DESNOS), which is currently under consideration for inclusion in DSM-IV. She suggests that prolonged and repeated exposure to trauma causes pathological changes in behavior and personality. PTSD: DSM-IV AND BEYOND, *supra*, Chapter 12.

<sup>12</sup> Fetal Alcohol Syndrome (FAS) is defined as a chemical imbalance in the fetus caused by excessive drinking by the mother, and affecting the central nervous system of the developing fetus, manifest in a cluster of

## Effects of PTSD

The impact on most organisms that live with long-term stress is biological change and eventual breakdown.<sup>15</sup> In humans, acute or chronic stress produces both a biological response and an emotional response. Psychiatrists believe that if the trauma (or stressor) is significant enough to create the threat of death, or the perception that the victim might die, the person's sense of safety in the world may be unalterably affected. Long after the traumatic event is over, PTSD survivors live with an enhanced sense of threat as well as impaired impulse control, and difficulty in controlling strong emotions. The mind and body's struggle to recover from trauma often produces a constriction of the personality, a dampening down of emotions, and an attempt to forget or repress the traumatic memories. A resurgence of all the original feelings can and often does come with a stimulus, most likely in the form of a similar event that triggers the repressed memories and feelings produced by the original event.<sup>16</sup>

General conditions that seem to hold true for people reacting to acute or chronic traumatic stress include: protracted depression, avoidance of thoughts or feelings associated with the trauma, inability to recall important aspects of the trauma, feelings of detachment or estrangement, sleep problems, restlessness, withdrawal, hyperstartle, hypervigilance, confusion, paranoia, overwhelming fear, a restricted range of affect, and a sense of a foreshortened future.<sup>17</sup>

Helping our clients unlock these memories can provide support for defenses to crimes or explanations in mitigation of criminal behavior by ex-

plaining how events surrounding the charged crime triggered reliving the original trauma.

## When we want mental state evidence admitted, what do we argue?

### 1. Relevance: Raising a Reasonable Doubt on Mental State

Due process requires that every criminal defendant be afforded the opportunity to have evidence of his/her state of mind (also known as relevant mental condition) placed before the jury. If this kind of evidence is excluded, the right to present an effective defense is imperiled. (*Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967).) The California Legislature purported to abolish the "diminished capacity" defense in 1981, yet evidence of mental impairment and/or intoxication may still be offered on the issue of whether the defendant actually formed a required specific intent, or mental state. (Penal Code sections 22, 28.)<sup>18</sup>

In fact, the Legislature may not deny a defendant the opportunity to disprove a requisite mental state. *People v. Bobo* (1990) 229 Cal.App.3d 1417, 1442. A defendant retains the 14th Amendment due process right to present evidence on, and have the jury determine, any

issue which negates a mental element of the charge.<sup>19</sup>

Battered women have paved the way for the introduction of evidence of past mistreatment as a way to shed light on the issue of intent in the charged crime. Responding to articulate advocates for battered women, the Legislature relaxed the rules for admission of expert testimony on Battered Women's Syndrome (BWS).<sup>20</sup> New Evidence Code section 1107, enacted in 1991, makes expert testimony on BWS generally admissible.<sup>21</sup> Section (a) provides that "expert tes-

"diminished capacity." Hence, since 1981, defense lawyers trying to bring in evidence about their clients' mental state have had to show that it is relevant to whether or not their clients *actually* formed the requisite intent.

<sup>19</sup> See, Tom Lundy, *Adventures in the Wonderland of Specific Intent*, 20 CACJ FORUM 2 (1993).

<sup>20</sup> "Battered Woman Syndrome" (BWS) is a term used to describe the behavioral patterns of women who have been the victims of violence perpetrated by their partners, and who have remained in the relationship after repeated violent incidents. Offered to explain how a woman's particular experiences affect her perceptions of danger and her honest belief in its imminence, BWS evidence has become increasingly accepted in the courts. The dynamic is generally described as a cycle of violence involving three phases: tension building, an acute battering incident, and a tranquil period of (often) loving contrition. Some victims of BWS exhibit a condition known as "learned helplessness" which causes distorted behavior—passivity and compliance rather than resistance or attempts to escape. Overwhelming fear that the batterer will kill them (or their children) if they attempt to leave is another factor in the behavior of women who suffer from BWS.

For further information, see: WALKER, LENORE, *THE BATTERED WOMAN* (1979); *THE BATTERED WOMAN SYNDROME* (1984); TERRIFYING LOVE (1989); Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991); Murphy, *Assisting the Jury in Understanding Victimization: Expert Psychological Testimony on Battered Woman Syndrome and Rape Trauma Syndrome*, 25 COLUM. J.L. & SOC. PROBS. 277 (1992); Taylor, *Provoked Reason in Men and Women: Heat of Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L.REV. 1679 (1986).

<sup>21</sup> CACJ was instrumental in ensuring passage of the legislation amending Evidence

<sup>15</sup> SELYE, H., *THE PHYSIOLOGY AND PATHOLOGY OF EXPOSURE TO STRESS* (1950), Montreal: ACTA, Inc.

<sup>16</sup> Kaser-Boyd, N., Balash, S., *Battered Woman Syndrome and Other Subtypes of Post-Traumatic Stress Disorder: Strengths and Liabilities in the Courtroom* 19 CACJ FORUM 4 (1992).

<sup>17</sup> PTSD: DSM-IV AND BEYOND, *supra*, at 75. Felicia Morgan's survival mechanism: "My ears be wide open, even when I'm asleep," *supra*, is an example of the hypervigilance common in PTSD survivors.

<sup>18</sup> In 1978, former San Francisco Supervisor Dan White shot and killed then-Mayor George Moscone and Supervisor Harvey Milk. The killings occurred in San Francisco City Hall during business hours, and the defendant, a former San Francisco fireman and friend of many San Francisco police officers, surrendered. The sympathetic police detectives conducting White's post-surrender interrogation asked him to "tell us about the pressures you've been under lately . . ." White's lawyers offered psychiatric testimony focusing on White's state of mind. The expert testified about the effect of a super-junk food diet on an already overstressed mind. This "Twinkie" defense was ridiculed in the press, but the jury found it persuasive. White's later acquittal of murder (he was convicted of voluntary manslaughter instead), resulted in mass demonstrations and public outcry. The Legislature responded by trying to close the door on mental defenses falling somewhere short of insanity. The new Penal Code sections substituted "diminished actuality" for

timony is admissible by either the prosecution or the defense, regarding battered women's syndrome, including the physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge." Section (b) of the new statute describes the minimal foundation required: the proponent must simply establish relevancy and properly qualify the expert witness. The section goes on to state: "Expert opinion testimony on battered women's syndrome shall not be considered a new scientific technique whose reliability is unproven."

Two recent battered women cases seem to indicate a judicial willingness to make the link between past mistreatment and mental state that the judge in the Menendez case found so difficult to understand. In both, failure to investigate the possibility that a client suffered from battered woman syndrome, and thus to offer the evidence at trial, resulted in reversal. *People v. Day* (1992) 2 Cal.App.4th 405; and *People v. Romero* (1992) 15 Cal.App.4th 1519, rev. granted \_\_\_\_ Cal.4th \_\_\_\_, 17 Cal.Rptr.2d 120.

In *People v. Day, supra* the Court found reversible error in defense counsel's failure to offer evidence of BWS to rebut the prosecutor's impeaching cross-examination of the defendant. Day claimed self-defense: during cross-examination, the prosecutor raised the inference that her conduct before and

after the incident was inconsistent with that defense. "Had evidence of the BWS been introduced, he (defense counsel) effectively could have countered the battered woman myths on which the prosecutor built his case. . . . BWS evidence would have bolstered appellant's credibility, and lent credence to her self-defense claim." (*Day, supra* at 420).

An earlier case, predating the changes to Evidence Code section 1107, opened the door for the introduction of expert testimony re BWS. *People v. Aris* (1989) 215 Cal.App.3d 1178, 1196 held that such expert testimony was admissible, although for limited purposes, when offered by the defendant to support a claim that she assaulted or killed her abusive husband in self-defense. The court found that the proffered BWS evidence was not admissible to prove the objective reasonableness of D's claimed self-defense. However, it also held that it was error (albeit harmless) to exclude expert testimony regarding BWS, to the extent defendant's particular experiences affected her perceptions of danger and its imminence.<sup>22</sup>

*People v. Romero, supra*, which was not a domestic violence case per se, is particularly noteworthy for defense lawyers needing arguments to support the notion that a client's history of abuse is relevant to alleged criminal behavior. Debra and Terrance Romero were jointly charged with robbery and attempted robbery, and Debra's defense was duress. Although her trial lawyer recognized the possibility that Debra Romero suffered from BWS and made some inquiries about finding an expert witness to conduct an evaluation, that is as far as he went. The court found that counsel's failure to investigate was unreasonable. Even though Debra Romero's case went to trial before the Legislature added section 1107 to the

Evidence Code, the court still found it would have been reasonable to expect a criminal defense lawyer to recognize the applicability of BWS evidence to a duress defense. *Romero, supra* at 1162, fn.11.

*Romero* makes clear that despite limitations on the scope of allowable mental defenses, counsel still has the obligation to undertake "careful factual and legal investigations and inquiries with a view to developing matters of defense in order that he (sic) may make informed decisions on his (sic) client's behalf . . . (citation omitted). If as a result of his (sic) failure to undertake a careful inquiry and investigation a crucial defense is withdrawn from the case, the defendant has not had the assistance of counsel to which she is entitled." (*People v. Romero, supra*, 11 Cal.App.4th 1150, 1162, quoting *People v. Shells* (1971) 4 Cal.3d 626, 630 and *People v. Ibarra* (1963) 60 Cal.2d 460, 464.)

## 2. A Variety of Theories

When you are seeking admission of expert testimony on some syndrome or mental state other than battered woman syndrome, you will still have to convince the judge of the nexus between your client's story and the lack of the requisite mental state. Traditionally, expert testimony is deemed relevant if it will be of assistance to the jury in deciding the facts of the case. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise" (Federal Rules of Evidence, Rule 702) If the witness is qualified, and the subject is "sufficiently beyond a common experience" that hearing the witness's testimony would assist the trier of fact in understanding the evidence or in determining a fact in issue, then the testimony should be admitted. (Evidence Code sections 720, 801). The California Supreme Court has "interpreted this language to require exclusion of expert opinion 'only when it would add nothing at all to the jury's common fund of information. . . ." (*People v. Stoll* (1989) 49 Cal.3d 1136, 1154, quoting *People v. McDonald* (1984) 37 Cal.3d 351, 367.)

Outside the BWS context, in which

Code section 1107. Former CACJ President Leslie Abramson helped draft it, and legislative advocate Melissa Nappan lobbied for its passage.

A bill co-authored by State Senator Killea and Assembly Member Moore, proposing a change in the definition of voluntary manslaughter in domestic violence cases, came within one vote of passage in the Legislature this past session. Senate Bill 1144 would have provided that the jury or court is entitled to infer an honest but unreasonable belief in the necessity to resort to self-defense if the defendant has both been subjected to a history or pattern of repeated abuse or domestic violence by the decedent, and was in an intimate relationship with the decedent.

<sup>22</sup> Brenda Aris was granted clemency by Governor Wilson on May 28, 1993. Prof. Kathleen (Cookie) Ridolfi, Santa Clara University Law School and the California Coalition for Battered Women in Prison represented Ms. Aris. See also, Ridolfi's response to Governor Wilson's limited grants of clemency: *Governor Improperly Restricted Use of Pardoning Power*, CALIFORNIA STATE BAR BULLETIN, 7/28/93, at 1.

the Legislature has specifically sanctioned admission of expert testimony, defense counsel should consider a variety of theories for connecting the expert testimony to the mental state in issue.

First, counsel might argue by analogy to Evidence Code section 1107 that if the defendant has been a victim of repeated abuse, PTSD would be admissible to show, in the vernacular of section 1107, its "effects upon the beliefs, perceptions or behavior of victims" of such violence. The Legislature has acknowledged the relevance of this expert testimony to one class of defendant; there is no principled reason to restrict the evidence to that group of defendants.<sup>23</sup>

Second, defense counsel should consider employing established defenses such as unconsciousness in the PTSD context. See *e.g.*, *People v. Wu* (1991) 235 Cal.App.3d 614, a case in which a mother was charged with the murder of her child. Trial counsel introduced testimony showing that at the time of the killing the mother's extreme emotional and psychological distress brought on a fugue state. The trial court refused a requested instruction on the defense of unconsciousness. The Court of Appeal reversed, holding that there was sufficient evidence to support the instruction. Predictably, *Wu* was depublished;

but the authority upon which it relied remains good law supporting a defense of unconsciousness where the psychological forces acting on defendant are so severe as to produce action without awareness. See *e.g.*, *People v. Wilson* (1967) 66 Cal.2d 749; *People v. Moore* (1970) 5 Cal.App.3d 486. See CALJIC No. 4.30.<sup>24</sup>

Expert testimony negating the inference of a predisposition to commit the charged crimes may be admissible as character evidence. Refusal to permit "Anti-Syndrome" evidence in a prosecution for lewd and lascivious acts against a child may result in reversal. In *People v. Stoll*, *supra*, child molestation convictions were reversed due to the trial court's prejudicial exclusion of defendant's proffered evidence of psychologist's opinion that he showed no signs of "deviance" or "abnormality." The court held the evidence was relevant to the defendant's claims that the charged acts did not occur, the psychologist's qualifications were well established, and the testimony would have been proper character evidence.

### An approach to interviewing<sup>25</sup>

Part of the problem in figuring out how to get relevant mental state evidence admitted is overcoming clients' resistance to talking about traumatic events. Clients suffering from some form of PTSD are unable to tell you so directly. Their symptoms (denial, depression, substance abuse, etc.) are almost all impediments to easy disclosure. What survivors of PTSD cannot help doing, however, is reveal clues to their histories in their interactions with you. An awareness of the behavior pat-

terns that characterize a PTSD survivor will make it easier for you to recognize such clients and respond appropriately. Some suggestions borrowed from therapists to encourage reluctant patients to talk about their histories are:

**1. To make it easier to build trust, identify one person in the defense team to play the mental health role—to be the client's confidante regarding psycho-social issues.** If you have the resources, use an experienced psychologist. If not, consult with one, read what you can, and pay attention to the client's responses.

**2. Ask open-ended questions.** Listen to the client's responses and watch how s(he) interacts with you. Be careful not to talk in psychobabble or lawyer-speak. Don't label the phenomenon you think might be present (*i.e.* "Are you a battered woman? Was your father an alcoholic?") Try instead to move people to tell their stories in their own ways: "Can you think of a time when your father was angry? Tell me about that time." Ask for more and more detail, as concrete as possible, until you think that memory is exhausted. Come back to it later.

We know this technique already: we learned it the hard way during our first few weeks of practice. "Okay, now tell me this," you asked in your most lawyerly way, "Did you give a statement to the police?" "No way," says the client, you think I'm stupid?" But when you get discovery from the DA, there's a detailed, 10-page, tape-recorded confession! That's how we knew to ask it differently: "Okay, I want to hear everything you can remember about getting arrested, from the time the cop first came up until he left you in the jail cell . . . and "Then what happened? What did the cop first say to you? And what did you tell him? . . . and did you ever see him write anything down? Anybody else around? What else did he say? What else did you say to him?"

**3. Take it slow. Be gentle.** Explain the concept of confidentiality in easily understandable ways. Tell the client why you are asking all these prying questions. *E.g.*, "This is important to me because it's part of who you are, and because this information may give us a way to help get you out of this situation." Communicate with the client often: keep him/her informed about the process you are going through.

<sup>23</sup> Defendants other than battered women may be able to argue that Evidence Code section 1107 permits them to introduce expert testimony like BWS. Section 1107 permits testimony regarding the effects of BWS on "victims of domestic violence." The statute defines "domestic violence" by reference to section 542 of the Code of Civil Procedure (Domestic Violence Protection Act). That section defines domestic violence as abuse perpetrated against "any of the following: (1) A spouse, former spouse, cohabitant, former cohabitant, any other adult person related by consanguinity or affinity within the second degree, or a person with whom the respondent has had a dating or engagement relationship. (2) A person who is the parent of a child. . . ."

Moreover, defendants may have a claim that limiting BWS-type mental evidence to the class of battered women would deprive other similarly situated defendants of the equal protection of the laws. A cohabitant should likewise be able to present expert testimony to explain the effects of their particular mental condition on criminal intent.

<sup>24</sup> PTSD may also be relevant to the traditional defense of heat of passion, to the extent that the defendant's "passion" may be the product of having been the victim of persistent violence. (See *People v. Borchers* (1958) 50 Cal.2d 321 [passion may be rage, anger or any other intense emotion].)

<sup>25</sup> Many of the suggestions below are the product of a telephone conversation on June 10, 1993 with psychologist Kathleen Wayland, Duke Medical Center, Dept. of Psychiatry, Durham, North Carolina. Dr. Wayland's work concentrates on traumatized children and their resultant conduct disorders.

4. **Once there has been a first mention of some traumatic event or pattern of behavior (physical or sexual abuse, combat, whatever) then respond supportively and tread lightly.** Remember that for trauma survivors to describe the event is sometimes to relive the trauma. Lawyers are not therapists. Try to get the court to pay for the services of a therapist and/or look for one who is willing to treat your client pro bono.

5. **Be careful not to relate to your client as a victim**, so as not to reinforce the negative self-image that often is a byproduct of abusive treatment. Surviving an attempt at dehumanization is a testament to the individual's ability to develop extreme coping mechanisms. Being able to talk about a trauma is an initial stage of recovery. Therapists call it naming or claiming and believe it helps the person overcome repeated reliving of the trauma.

6. **Investigate your client's background.** Locate all the documents you can find: school records; hospital and psychiatric records of client and parents; parents' criminal records; police reports of domestic violence or sexual abuse in the client's home.

Any corroboration of your client's story serves a dual purpose: it makes your defense more real to the court, thus increasing your chances of getting it to the jury, and it provides emotional support for the client. When you go to great lengths to find evidence to back up a client's story, you are communicating a kind of faith that may help give the client the courage to testify.

**If we lose admissibility arguments, how do we respond? Imagine the judge has the nerve to deny a carefully crafted and brilliantly argued motion and offer of proof . . .**

1. **Try again: see if the court will allow a compromise.** Request permission for the expert to testify about the defendant's mental condition and about any relevant syndromes, such as PTSD generally, or Battered Woman or Abused Child syndrome specifically. Promise to refrain from asking for an opinion that the alleged crime was a "product" of the mental condition in this case. Offer an instruction tailored to the facts of your case and the state of

the law: that "a defendant is not responsible if at the time of his (sic) unlawful conduct his (sic) mental or emotional processes or behavior controls were impaired to such an extent that he (sic) cannot justly be held responsible for his (sic) act." *United States v. Brawner*, 471 F.2d 969, 986 (D.C. Cir.1972 Bazelon, C.J., concurring in part and dissenting in part). See also CALJIC 9.35.1 (1992) cautionary instruction on BWS.

Offer another instruction to your expert defining the limitations of her role: "As an expert witness, you may, if you wish, and if you feel you can, give your opinion about whether the defendant suffered from a mental disease or defect. You may then explain how defendant's disease or defect relates to his alleged offense, that is, how the development, adaptation and functioning of defendant's behavioral processes may have influenced his conduct. This explanation should be so complete that the jury will have a basis for an informed judgment on whether the alleged crime was a 'product' of his mental disease or defect. But it will not be necessary for you to express an opinion on whether the alleged crime was a 'product' of a mental disease or defect, and you will not be asked to do so . . ." (See Judge Bazelon's model instruction in *Washington v. U.S.* 390 F.2d 444, 457-58 (D.C. Cir. 1967);

2. **Prepare your client to testify:** No matter how impressive your expert, your client's direct testimony is probably the best way to communicate his/her mental state at the time of the alleged crime in the context of his/her life story. Working with the client to help him/her understand the relationship between the traumatic events and his/her present circumstances may make it easier for your client to communicate. Your ongoing conversations with your client, particularly if supplemented by therapy, will affect your client's comfort level—eliminating some of the flat-affect, detached quality that creates credibility problems for a client who suffers from PTSD.<sup>26</sup>

3. **Become the excluded expert in closing argument:** Consult with people

knowledgeable in the particular syndrome. Read whatever you can find. Think about factual illustrations, generalizations, studies you can use that connect your client's story to a universally understandable story. Think about Robert Alton Harris, David Mason and Felicia Morgan.

### **Why Courts Resist Linking a Defendant's Background to Specific Intent**

#### **Legal Fictions**

The criminal justice system functions

more effective witness without therapy. A client who chooses not to undergo therapy may appear detached and unemotive on the witness stand. Some BWS specialists believe that there is an advantage to having the client appear before the jury in this untreated state. Rather than forcing therapy on an unwilling client, these specialists prefer to offer expert testimony to explain the connection between their client's trauma and her flat affect.

## **AUTOMATIC CROSS-EXAMINATION**

*by David R. Reed*

**Dramatically improve your cross-examination technique overnight! This revolutionary system not only reveals the seventeen secrets of great cross-examination but translates common courtroom situations into easy-to-remember acronyms you'll use forever. Each acronym is thorough and designed for dramatic impact. Never be lost with any witness. Now, simply apply an acronym and automatically destroy informants, identity witnesses, detectives. . . almost any type of witness to win cases. This book is the only guide you'll ever need on cross-examination and a 'must' to become a great trial lawyer. . . ON SALE NOW!**

Tax Deductible. Send \$29.95 payable to David R. Reed at 8530 Wilshire Blvd. Suite 404, Beverly Hills, CA 90211 or call (310) 854-5246 for information.

<sup>26</sup> There are differing opinions among lawyers who specialize in defense of battered women as to whether the client makes a



on the basis of some fundamental principles, strongly espoused, but often honored in the breach. These legal fictions include the presumption of innocence: a cornerstone of due process that is widely proclaimed, but, inside the courthouse, almost universally disbelieved. Though jurors are still instructed to presume a defendant not guilty, the judge and prosecutor often convey the opposite meaning by their attitude toward the defendant. Cynicism is contagious: it is not hard for an observer to pick up on the fact that most participants in the system presume the defendant guilty (at least) as charged.

Prosecutors often see their job as simply proving the facts. Although most crimes require a union of act and intent, intent is generally presumed from the (often grisly) facts themselves. Defense efforts to focus the court's attention on the defendant's background and its effect on his/her intent to commit the crime are discouraged. For many trial judges, the only issue is "did (s)he do it, or didn't (s)he?" and, since we know s(he) did, "let's get on to sentencing."

Institutional resistance to letting juries hear defendants' true-life horror stories is easy to understand: the criminal law is based on two of the biggest legal fictions of all: that criminals are Evil, and that punishment works to deter them from future crimes.<sup>27</sup> Traditional theories of crime and punishment teach us that criminals are people exhibiting an innate "vicious will" who, when confronted with the choice between right and wrong, choose freely to do wrong.<sup>28</sup> But those of us who represent criminal defendants have a different point of view: as in Felicia Morgan's case, "choice" is rarely the word that accurately describes our clients' relationship to their actions.

The criminal justice system has been slow to legitimize the connection between enormously traumatic life events or chronic abuse and violent crime because the system is not equipped to handle it. Evidence that many "criminals" are bruised and abused people acting out the destinies their families and communities have shaped for them is too

threatening to the status quo.

A defendant's psychosocial history is relevant to the ability to form criminal intent. Judges and juries need to hear the facts of the case in the context of the larger story, the whole story: "What was going on here? Who is this person? What were his/her options?"

If we acknowledge the role physical, sexual and emotional abuse has in the shaping of the psyche, we will have to replace our prisons with community centers that provide childcare, health care, shelter, substance abuse treatment, parenting classes and job training. We

will have to start by protecting our children.

It is our job to try to bring evidence about the forces present in our clients' mental and physical lives into the courtroom, to fight the court's cynicism, and to tell each client's individual story. We need to uncover these stories sooner rather than later: if we can bring this kind of evidence into the courtroom at an early stage in a person's antisocial development, then we create the possibility of intervention, and some of these same clients may not end up on Death Row. □

## 1993 CACJ/CPDA

### Death Penalty Defense Seminar Syllabus

*Sold only to defense teams!*

Did you miss the 1993 CACJ/CPDA Death Penalty Defense Seminar? You can still benefit from the written materials by ordering the Seminar Syllabus. Edited by Gregory Paraskou of the Santa Clara Public Defender Office, this 905-page syllabus is a treasure trove of late-breaking scientific and legal developments that no capital lawyer should be without! Includes:

- DNA Selective Bibliography, *William C. Thompson*
  - Brain Imaging Techniques, *John Wicks, Ph.D.*
  - Controlling the Runaway Witness, *Larry Pozner & Roger Dodd*
  - Defending in an Age of Reciprocal Discovery, *Charles Sevilla*
  - Glossary of IAC Decisions, *Clive Stafford Smith*
  - Whose Case Is It, Anyway? *Stuart R. Rappaport*
  - Suggestions for Preparing Victim Impact Testimony, *John Cotsirilos, Christie Warren*
  - Facing the Future, *Millard Farmer*
  - Checklist for Handling Capital Cases, *James McWilliams, Greg Paraskou, Christie Warren*
  - References on Mitigation Issues, *Stephen Pittel, Ph.D.*
  - Accomplices & Snitches, *Clive Stafford Smith*
  - Coping Responses to Psychosocial Stressors Among Mexican & Central American Immigrants, *Amado Padillo, Richard Cervantes, Margarita Maldonado, Rosa Garcia*
- ... and much, much more!

**Members: \$40.89; nonmembers: \$51.71.**

**To order, call CACJ at (310) 204-0502.**

<sup>27</sup> This article only addresses the first of these two fictions.

<sup>28</sup> Pound, Roscoe, *Introduction to F. SAYRE, CASES ON CRIMINAL LAW* at xxxvi (1927).